IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.08.2005

Coram:

The Honourable Mr.MARKANDEY KATJU, The Chief Justice
and
The Honourable Mr.Justice D.MURUGESAN

Writ Petition No. 27319 of 2004
and
W.P.M.P.Nos 33230 & 33231 of 2004

****

1. Wellworth Electronics
   rep. by its Proprietor
   Mr.G.Srinivasan
2. A. Ravichandran
3. A. Lakshmi
4. M.Umarani ... Petitioners

vs.

1. The Union of India
   rep. by the Secretary to Government,
   Law, Justice and Company Affairs,
   New Delhi.

2. The Debts Recovery Tribunal
   rep. by the Registrar,
   Coimbatore.

3. Indian Overseas Bank
   rep. by its Authorised Officer,
   Leigh Bazaar Branch,
   Salem. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issue of a Writ of declaration for the reasons stated therein.

For Petitioners ... Mr.Srinath Sridevan

For Respondent 1 ... Mrs.V. Yamuna Devi
Addl.Central Govt.Standing Counsel

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For Respondent 3 … Mr.F.B.Benjamin George

O R D E R

THE HONOURABLE THE CHIEF JUSTICE

By means of this writ petition, the petitioners have prayed for a writ declaring the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest (Removal of Difficulties) Order, 2004 contained in Notification No. SO 466(E) dt.06.04.2004 as illegal and ultra vires.

2. Heard the learned counsel for the parties.

3. It appears that the third respondent/Indian Overseas Bank issued a notice dated 23.04.2004 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ' the Securitisation Act') proposing to take certain actions against the properties alleged to be mortgaged. The third respondent thereafter issued a possession notice on 28.07.2004 under Section 13(4) read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 taking symbolic possession of the property.

4. Aggrieved by the issuance of the possession notice, the petitioners preferred an appeal before the second respondent/Debt Recovery Tribunal on 26.08.2004 under Section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 within the prescribed time limit.

5. The Tribunal however returned the petitioners' appeal calling upon them to pay court fee, making a reference to the impugned notification dated 06.04.2004. The impugned notification purports to have been issued under Section 40(1) of the Securitisation Act, 2002. Under this order, the provisions of the Debt Recovery Tribunal (Procedure) Rules, 1993 were made applicable mutatis mutandis to appeals filed under Section 17 of the Securitisation Act also.

6. It is alleged by the petitioners that the impugned order is illegal and ultra vires and hence the action of the Tribunal in returning the petitioners' appeal for failure to pay the court fee is also illegal. It is further alleged that no doubt Section 40 of the Securitisation Act empowers the Central Government to issue orders for removal of difficulties arising in giving effect to the provisions of the Act. However, it is alleged that this power can be exercised only in cases where difficulties actually arise, and at any rate, this power cannot be exercised contrary to the provisions of the Act. It is further alleged that Section 17 of the Securitisation Act, as it stood at the relevant time, did not envisage or empower the levy of fee for entertaining or taking on file the appeal. Hence

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the first respondent by an executive fiat cannot do something which the legislature did not empower it to do.

7. Learned counsel for the petitioners submitted that filing of the appeal was in no way hampered by non-imposition of court fee. The levy of Court fees only causes difficulty, if at all, in filing appeals. Hence the impugned order does not come within the ambit of Section 40 of the Securitisation Act as the power to make such provisions or issue such directions is conditioned by the existence of a difficulty arising in giving effect to the provisions of the Act. Moreover, it is alleged that collection of court fee bears no nexus with the object sought to be achieved by the Securitisation Act, which is speedy recovery of the bank loans.

8. A Division Bench of this Court in M/s.Digivision Electronics Limited v. Indian Bank, rep. by its Deputy General Manager and another (W.P.No.13056 of 2005 decided on 07.07.2005) rejected the challenge to the fee for filing application under Section 17 of the Securitisation Act. However, learned counsel for the petitioner has contended that the Division Bench was not called upon to consider the case where an appeal had been preferred before the Debts Recovery Tribunal prior to 11.11.2004, and where no court fee had been paid. Hence, it is submitted by the learned counsel, that the aforesaid decision of the Division Bench is distinguishable.

9. Learned counsel for the petitioners submitted that prior to 11.11.2004 there was no power in the statute to prescribe a fee for filing an appeal under Section 17 of the Securitisation Act. Prior to 11.11.2004 there was no express provision in Section 17(1) of the Securitisation Act nor was there any rule making power in Section 38 (2) of the Securitisation Act to prescribe the fee to be remitted alongwith the appeals.

10. Section 38(2)(ba) came into force only on 11.11.2004. It is contended by the learned counsel for the petitioner that in the absence of any express power either in Section 17 or Section 38 of the Securitisation Act, the Executive cannot prescribe a fee under the guise of the power to remove difficulties. It is alleged by the learned counsel for the petitioner that the words " along with such fee as may be prescribed" have been introduced by the amendment of 2004 with effect from 11.11.2004.

11. Before dealing with the submissions of the learned counsel for the petitioner it may be noticed that the amendment to Section 17 by the amendment Act of 2004, so far as it relates to fee, was no doubt made in the year 2004, but it specifically states that it is retrospective from 21.06.2002. The Amendment to Section 17 states: -

> " Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this chapter, may make an application alongwith such fee as may be

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prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:
(Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower)"

12. Thus, the learned counsel for the petitioners is not correct in contending that the amendment was not retrospective. In our opinion in view of the amendment there can be no doubt that any appeal/application filed under Section 17 of the Securitisation Act attracts court fee with effect from 21.06.2002. In the present case, the appeal/application under Section 17 of the Securitisation Act was filed before the Tribunal on 26.08.2004. Hence the court fee has clearly to be paid as prescribed and the case is covered by the Division Bench judgment of this Court in M/s.Digivision Electronics Limited v. Indian Bank, rep. by its Deputy General Manager and another (W.P.No.13056 of 2005 decided on 07.07.2005).

13. Learned counsel for the petitioner then contended that even if Section 17 of the Securitisation Act had been amended retrospectively from 21.06.2002, yet no fee can be realized from the petitioner, since the Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest (Removal of Difficulties) Order, 2004 was issued only on 06.04.2004. By this order, the provisions of the Debt Recovery Tribunal (Procedure) Rules, 1993 were made applicable mutatis mutandis to appeals filed under Section 17 of the Securitisation Act also.

14. Learned counsel submitted that no court fee had been prescribed before 06.04.2004. In our opinion, there is no merit in this submission also. In the present case, the appeal/application under Section 17 of the Securitisation Act was filed by the petitioner on 26.08.2004, that is, long after the Removal of Difficulties order 2004 was issued by the notification dated 06.04.2004. Hence we cannot see how the petitioners can contend that they do not have to pay the fee.

15. Moreover in our opinion since the amendment to Section 17 of the Securitisation Act has been made retrospective from 21.06.2002 court fee has to be paid on all applications/appeals filed on or after 21.06.2002 under Section 17 of the Securitisation Act. A plain reading of the words " may make an application along with such fee as may be prescribed", which have been introduced retrospectively from 21.06.2002, shows that the applications filed on or after 21.06.2002 have to be accompanied with the requisite court fee. It is true that the court fee was prescribed only by the Removal of Difficulties order 2004, but, in our opinion, the Removal of Difficulties Order, 2004 is only procedural in nature and the substantive law was introduced by the amendment to Section 17 of the Securitisation Act retrospectively from 21.06.2002 which stated that the application has

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to be accompanied with the prescribed fee. In our opinion this prescription of the fee can be done subsequent to the amendment, but it will relate back to the date of the amendment.

16. It is well settled that procedural provisions are ordinarily retrospective in nature vide Hitendra Vishnu Thakur v. State of Maharashtra, AIR 1994 SC 2623 (2641), Gurbachan Singh v. Satpal Singh, AIR 1990 SC 209 (vide paragraphs 36 & 37), Delhi Cloth and General Mills Co. Ltd v. CIT, Delhi, AIR 1927 PC 242 (244) etc.

17. Halsbury's Laws of England (Fourth Edition) Vol.44 p.574 states: -

> " The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."

18. As observed by Lord Denning in Blyth v. Blyth, (1966) 1 All.ER 524 (HL): -

> " The rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure……"

19. In stating the principle that a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only retrospective, the Supreme Court in Anant Gopal Sheorey v. State of Bombay, AIR 1958 SC 915 (917) has quoted with approval the reason of the rule as expressed in Maxwell's Interpretation of Statutes: -

> " No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode" see also Union of India v. Sukumar Pyne, AIR 1966 SC 1206, Tikaram and Sons v. Commr. Of Sales Tax, U.P, AIR 1968 SC 1286 (1292) , State of Madras v. Lateef Hamid & Co., AIR 1972 SC 1781 (1784), Balumal Jamnadas Batra v. State of Maharashtra, AIR 1975 SC 2083, Rai Bahadur Seth Sriram Durgaprasad v. Director of Enforcement, AIR 1987 SC 1364, etc.

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20. As stated above, in our opinion the amendment to Section 17 of the Securitisation Act is a substantive provision, while the Removal of Difficulties Order is only procedural, and it has retrospective effect. Hence it will apply from the date when the amendment to Section 17 of the Securitisation Act was made i.e., from 21.06.2002.

21. In our opinion, court fee is only a matter of procedure, because it only relates to the procedure which has to be followed for enforcing a substantive right. While an appeal is a substantive right, the court fee on an appeal is procedural.

22. Moreover, as observed by the Court of Appeals in Barber Vs. Pigden, (1937) 1 All ER 126 and in Carson Vs. Carson, (1964) 1 All ER 681 (page-687) "the inhibition against retrospective construction is not a rigid rule and must vary secundum materium".

23. Hence, even if we assume that the prescription of the fee by the Removal Difficulties Order is a substantive law, yet in our opinion by necessary implication it will apply retrospectively from 21.06.2002. This is because otherwise the retrospectivity from 21.06.2002 given to the amendment to Section 17 will become ineffective and inoperative. It is not always necessary that an express provision must be made in a substantive provision to make it retrospective. Such retrospectivity can be by necessary implication, vide Mithilesh Kumari Vs. Prem Behari Khare, AIR 1989 SC 1247 (1254).

24. Craies on Statute Law, 7th Ed. writes that the general rule of law that statutes are not operated retrospectively may be departed from (a) by express enactment and (b) by necessary implication from the language employed, and the author goes on to say:

> "If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. Baron Parke, said in Lord Hatherley in Pardo Vs. Bingham, ((1989) LR 4 Ch App 735) did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be, construed, and said that the question in each case was whether the legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, what it was that the legislature contemplated. But as a statute is not to be read retrospectively except of necessity……..In Main Vs. Stark, ((1890) 15 AC 384) Lord Selborne said: 'Their Lordships, of course, do not say that there might not be something in the context of an

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> Act of Parliament, or to be collected from its language, which might give towards prima facie prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it…. In all cases, it is desirable to ascertain the intention of the legislature".

The above observation is quoted with approval in Mithilesh Kumari's Case (supra).

25. We are also not in agreement with the learned counsel for the petitioner that the Removal of Difficulties Order, 2004 is inconsistent with Section 17 of the Securitisation Act. The Removal of Difficulties Order, 2004 was obviously made because there was no clear provision about how much court fee had to be paid, although the amendment to Section 17 of the Act had been made retrospective from 21.06.2002, which meant that court fee has to be paid for any appeals/applications filed on or after 21.06.2002. There was thus clearly a difficulty in giving effect to the amended Section 17 which had to be removed, and it was obviously for this reason that the impugned Removal of Difficulties Order dated 06.04.2004 was issued. Hence we uphold the validity of the impugned notification dated 06.04.2004.

26. Hence, in our opinion, along with all appeals/applications filed on or after 21.06.2002, court fee as prescribed by the Removal of Difficulties Order, 2004 has to be paid, otherwise the appeal/applications under Section 17 of the Securitisation Act will be non-maintainable, and will be liable to dismissed as such.

27. We, therefore, dismiss the writ petition. However, in view of the Division Bench Judgment in M/s.Digivision Electronics Limited v. Indian Bank, rep. by its Deputy General Manager and another (W.P.No.13056 of 2005 decided on 07.07.2005) we give the petitioners one months time from today to file the appeal/application under Section 17 of the Securitisation Act before the Tribunal alongwith the prescribed court fee, and if they do so, the appeal/application will be treated as within limitation. No costs. Consequently, connected W.P.M.Ps are also dismissed.

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Asst.Registrar

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   Salem.

+ ONE CC TO MR. SRINATH SRIDEVAN, ADVOCATE SR NO 32249

+ ONE CC TO MR.F.B. BENJAMIN GEORGE, ADVOCATE SR NO 32150

Order in
W.P.No.27319 of 2004

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